

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NADA ALKOBARY : DETERMINATION
 : DTA NO. 830868
 :
for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for :
the Period Ended February 8, 2020. :

Petitioner, Nada Alkobary, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period ended February 8, 2020.

On November 7, 2022, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4), on the basis that the petition did not appear to be timely filed and that the Division of Tax Appeals lacked jurisdiction to hear the merits of the petition. By letter dated December 12, 2022, the 30-day period within which to respond to the notice of intent to dismiss petition was extended to January 23, 2023, upon the Division of Taxation’s request. On December 30, 2022, the Division of Taxation, by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel), submitted affidavits and documents in support of dismissal. On January 23, 2023, petitioner, appearing by Kenneth Frenkel, Esq., submitted affidavits and documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on January 23, 2023.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak,

Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

FINDINGS OF FACT

1. On March 11, 2022, petitioner, Nada Alkobary, filed a petition with the Division of Tax Appeals in protest of notice of determination assessment number L-053001078 (notice).

The notice states:

“This notice is being issued because you are liable as an Officer/Responsible Person of BEST GOURMET DELI GROCERY INC, for penalties determined to be due in accordance with Tax Law section 480-a 2.(c), 480-a 2.(d) & 480-a 3.(a).

You are being assessed AS A RETAIL DEALER.

On 02/08/20 investigators from the New York State Department of Taxation and Finance inspected your business premise and found cigarettes, tobacco products, or both, offered for sale while:

- you are not registered to sell the products, or
- your registration is suspended or revoked.

This is the first instance where we found your business to be selling cigarettes and tobacco products without a valid certificate. Therefore, we issued a civil penalty assessment of \$10,000.00.”

2. Petitioner states in her petition that she did not receive the notice and that the penalty it assesses is a duplicate liability that she has already paid.

3. On November 7, 2022, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent advised petitioner of its intent to dismiss the petition on the basis of timeliness. It stated:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that it was not timely filed, and the Division of Tax Appeals lacks jurisdiction. Each party shall have thirty (30) days from the date of this notice to submit written comments on the proposed dismissal.”

4. The 30-day period within which to respond to the notice of intent was extended, upon

the request of the Division, to January 23, 2023.

5. In response to the issuance of the notice of intent and to show proof of proper mailing of the notice, the Division submitted the following: (i) an affidavit, sworn to December 8, 2022, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail – Assessments Receivable" (CMR) postmarked March 11, 2021; (iii) an affidavit, sworn to on December 8, 2022, of Susan Ramundo, a manager in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; and (v) a copy of petitioner's 2019 e-filed IT-201 resident income tax return (form IT-201), filed on March 14, 2020, which was the last return filed with the Division before the notice was issued according to the affirmation of Mr. Evans, the Division's attorney. The address on the return lists the same Queens, New York, address as listed on the notice and the petition, except that petitioner's address on the notice includes an additional four zip code digits added to petitioner's five-digit zip code.

6. The affidavit of Marianna Denier, who has been in her current position since August 2022 and the Director of MAPs since July 2022, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier is the Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20210631700." Following the Division's

general practice, this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of “3/11.” In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “CERTIFIED NO.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “REFERENCE NO.” The names and addresses of the recipients are listed under “NAME OF ADDRESSEE, STREET, AND PO ADDRESS.”

8. The CMR in the present matter consists of 15 cut-sheet pages and lists 159 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Denier notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark, dated March 11, 2021, to each page of the CMR, wrote the number “159” on page 15 next to the preprinted “159” and the heading “Total Pieces and Amounts,” and initialed or signed page 15.

9. Page 9 of the CMR indicates that a notice with certified control number 7104 1002 9730 0288 5410 and reference number L 053001078 was mailed to petitioner at the Queens,

New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. Each page of the CMR in exhibit “A” of the Denier affidavit contains a USPS postmark of March 11, 2021. On page 15, the postal service clerk wrote 159 to indicate 159 pieces of mail were received by the USPS. There is a set of initials or a signature on page 15.

11. According to the Denier and Ramundo affidavits, a copy of the notice was mailed to petitioner on March 11, 2021, as claimed.

12. In response to the notice of intent, petitioner submitted an affidavit, sworn to on January 20, 2023. In her affidavit, petitioner states that because she had other assessments issued

to her in connection with the same February 8, 2020 inspection and she was timely in paying these other assessments, she would have timely paid the notice at issue had she received it. Petitioner further suggests, “the notice may have gotten lost in the mail.” Petitioner also alleges that because she received other assessments in connection with the same February 8, 2020 inspection, the notice at issue is duplicative.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may be granted: “if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law § 478). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996; *Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). This is because, absent a

timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The evidence required of the Division in order to establish proper mailing is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved

in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice was mailed as addressed on March 11, 2021. Further, petitioner's address on the subject notice, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioner's IT-201 for the tax year 2019.¹ This was petitioner's last known address prior to the issuance of the notice. It is thus concluded that the Division properly mailed the notice on March 11, 2021, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date.

H. In sum, the Division has established that the notice of determination L-053001078 was properly mailed to petitioner at her last known address on March 11, 2021. Having established that the notice was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not mailed until March 11, 2022, a full year after the issuance of the notice.

I. Furthermore, petitioner has not rebutted the presumption of delivery that attaches to a properly issued notice of determination. The statements in petitioner's affidavit simply amount to a bare claim of nonreceipt. Such bare assertion is unavailing in the face of the evidence of proper mailing produced by the Division (*see Matter of T.J. Gulf. v New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]; *Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011).

¹ While it is noted that the Division added 4 additional zip code digits to petitioner's zip code as reflected on her 2019 personal income tax return filed, such a difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Furthermore, petitioner does not contend that the notice was improperly addressed.

J. Since, the petition was not filed until March 11, 2022, a date that falls beyond 90 days after the date of issuance of the notice, the petition is deemed untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*).

K. The petition of Nada Alkobary is dismissed.

DATED: Albany, New York
April 20, 2023

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE